

Internal Revenue Service

memorandum

CC:TL-N-9839-89

Br4:WHBaumer

date: JAN 19 1990

to: District Counsel, Jacksonville CC:JAX
Attn: Stephen R. Takeuchi

from: Assistant Chief Counsel (Tax Litigation) CC:TL

subject: Request for Tax Litigation Advice Concerning
Interpretation of Rev. Rul. 80-62

This is in reply to your request dated November 14, 1989, requesting reconsideration of our technical advice issued on October 20, 1989. In that memorandum we indicated that the substantiation requirements of I.R.C. § 274(d) are satisfied whenever an employer pays a per diem for travel away from home which is equal to or less than the federal per diem for the same area if the employee also substantiates the elements of time, place, and business purpose.

You note that Rev. Rul. 80-62, 1980-1 C.B. 83, in addition to requiring substantiation of the elements of time, place, and business purpose, also requires that an employer reasonably limit payment of travel expenses to those that are ordinary and necessary in the conduct of the trade or business. Based upon this language it appears to you that an employer does not reasonably limit such payments when the reimbursement is made without regard to whether the employee actually incurred a lodging expense. Such would be the case, for example, where employees sleep overnight with relatives.

Rev. Rul. 80-62 provides a test for determining whether an employer reasonably limits the payment of expenses for travel away from home to such expenses as are ordinary and necessary in the conduct of trade or business. In the case of per diem allowances in lieu of subsistence, such test is met by determining whether the employer's travel allowance practices are based on reasonably accurate estimates of travel costs, including recognition of cost variances encountered in different localities. In our memorandum of October 20, 1989, we indicated that a per diem lodging allowance that was less than or equal to the Federal Government's per diem lodging allowance should automatically be considered a reasonably accurate estimate of such lodging.

Due to your request for reconsideration, we have now coordinated this matter with the Income Tax And Accounting

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Division. In discussing the matter with members of Branch 4 of that Division, we have learned that the Service has not yet published any formal position with respect to whether the substantiation requirements are met when an employee incurs no costs.

The Services takes the position that an employee who incurs a cost that is less than the per diem allowance is not required to include the differential into income. Based upon that position a taxpayer might argue that an employee who incurs no cost should likewise not have to include the differential into income. The answer to this question in the case of a per diem for lodging may be the same as that in the case of a per diem for meals. Thus, for example, an employee on travel status that incurs no lodging costs should be treated the same as an employee on travel status that forgoes a meal. The resolution of this issue is presently being considered by Branch 4 of the Income Tax And Accounting Division. We anticipate a response within the next month. We will forward a supplemental response to you at such time as we are in receipt of their response.

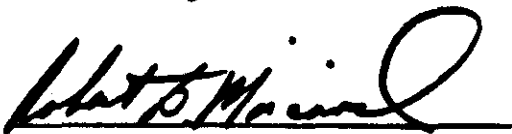
We would also like to draw your attention to Rev. Proc. 89-67, 1989-52 I.R.B. 17. That revenue procedure supercedes Rev. Rul. 80-62 for per diem allowances paid to an employee on or after January 1, 1990. Section 3.01 of Rev. Proc. 89-67 defines the term "per diem allowance" as one that meets the requirements specified in Treas. Reg. § 1.62-2T(c)(1) (relating to business connection, substantiation, and returning amounts in excess of expenses) and that:

(1) is paid with respect to ordinary and necessary business expenses incurred, or which the payor reasonably anticipates will be incurred, by an employee for lodging..., (2) is reasonably calculated not to exceed the amount of the expenses or the anticipated expenses, and (3) is paid at the applicable Federal per diem rate, a flat rate or stated schedule, or in accordance with any other Service-specified rate or schedule.

If you have any questions with respect to this memorandum, please contact William Baumer or Bob Miscavich at 566-3325.

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By:



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